Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by undersigned counsel, hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking ("Further Notice") in the above-captioned matter.[1] In its ***Order*** the Commission determined that certain aspects of the current operation of the local franchising process interferes with competitive entry and took steps pursuant to Section 621(a) of the Communications Act to assure that the franchising process does not unreasonably interfere with competitive entry into the cable market. Among other things, the Commission adopted rules that set a time limit for local franchise negotiations, limited the imposition by local franchise authorities ("LFAs") of build-out requirements, defined the appropriate limits on local franchise fees and public, educational, and governmental ("PEG") contributions and institutional networks ("I-Nets"), and limited the regulation by LFAs of mixed use networks.[2] The Further Notice tentatively concludes that the findings in the ***Order*** "should apply to cable operators that have existing franchise agreements as

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[1] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC **06-180** (Mar. 5,2007) ***("Order").***

[2] ***Order*** at ¶ *5*.

they negotiate renewals of those agreements with LFAs."[3] RCN submits that this is the minimum Commission action necessary to assure that the Commission's ***Order*** does not have an anticompetitive effect rather than the pro-competitive effect that the Commission intended.

However, RCN submits that this proposed remedy will not go far enough to result in competitive parity for existing providers who compete with such new entrants. Therefore, for the reasons set forth herein, RCN urges that the Commission apply two additional requirements so that existing providers, and especially smaller "existing new entrant" overbuilders, are not placed in a situation where franchise requirements that the Commission has declared unreasonable still apply to such entities and not to the well capitalized incumbent local telephone company "new entrants."

- The Commission should apply the "fresh look" doctrine to existing franchise and open video system ("OVS") agreements at such time as a new entrant enters the market pursuant to the Commission's ***Order*** and prior to the time that either existing franchise is scheduled for renewal in order to eliminate impediments to competition and thereby promote consumer choice.

- In markets where facilities-based cable competition already exist and there are two or more cable or OVS operators, existing franchises rarely expire at the same time. If the operator whose franchise or OVS agreement expires first is entitled to the relief proposed in the ***Order,*** the other provider would be at a competitive disadvantage with that operator and, if there is a third entity in the market by that time, that operator as well. Therefore, the Commission should apply the "fresh look" doctrine to an existing franchise when the first of such franchisees becomes eligible for the relief granted in the ***Order.***

DISCUSSION

RCN is the nation's first and largest facilities-based competitive provider of bundled phone, cable television, and high-speed Internet services with operations in 5 of the 10 largest markets in the United States. RCN has approximately 120 cable and OVS franchises with several long-term franchises, including a couple that extend for as many as 15 years. RCN offers

[3] ***Id.*** **at** ¶ 140.

its services over its own fiber optic network, in competition with the incumbent cable and telephone companies. As such, RCN has long been on the front lines of cable competition.

In the ***Order,*** the Commission affirmed that there are benefits from facilities-based competition between two cable systems in the same community.[4] However, the Commission determined that the in the vast majority of communities, facilities-based cable competition simply does not exist.[5] To eliminate the barriers to entry in the cable market and to encourage investment in broadband facilities, the Commission decided that: (1) an LFA must issue a decision for a new franchising applicant that has access to the rights-of-way within 90 days or the application will be deemed granted,[6] **(2)** unreasonable build-out requirements impose an unreasonable barrier to entry,' (3) demanding certain costs, fees, and other compensation without counting such amounts towards the statutory 5 percent cap on franchise fees is unreasonable,[8] (4) LFAs may not make unreasonable demands for PEG and I-Nets,[9] and (refusing to) grant a franchise for non-cable services or facilities issues is unreasonable.[10]

The Commission recognized that some of its determinations may also be relevant to existing franchisees, such as the demands for costs, fees, and other compensation above the 5 percent franchise fee cap and the demands for PEG and I-Nets, and tentatively concluded that findings in the ***Order*** should apply to cable operators that have existing franchise agreements as they negotiate renewal.[11] As described in detail below, RCN supports the Commission's

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[4] ***Id.*** at ¶ **8** (citing **S. Rep.** No. 102-92, at **47** (1991)), ¶ 50.

[5] *Id* at ¶ 19.

[6] ***Id.*** at ¶¶ **66-8**1.

[7] ***Order*** at ¶¶ 82-91.

[8] ***Id.*** at ¶¶ 94-109.

[9] ***Id.*** at ¶¶ 110-120.

[10] *Id* at ¶¶ 121-124.

[11] ***Id.*** at ¶¶ 94, 110, 140.

conclusion that the findings be applied at renewal and further recommends that the Commission take a fresh look at existing franchises when a new entrant enters the market and, in markets where there are already more than one franchised cable or OVS operator, when the first of such franchises expires and is up for renewal.

I. THE SAME REFORMS MUST AT A MINIMUM APPLY TO EXISTING CABLE OPERATORS AT THE TIME OF RENEWAL

A. Reform Is Necessary to Assure Competitive Parity

The Commission tentatively concluded that the findings in the *Order* should apply to existing franchisees at the time of renewal.[12] Such a conclusion is necessary to ensure competitive parity between existing franchisees with new entrants. Without it, the existing "new entrant" – often a highly capitalized incumbent local telephone company who already has a customer/vendor relationship with the vast majority of households in the market as a result of its incumbent telephone status – will have a significant governmentally mandated cost advantage over existing providers. In RCN's markets, the PEG fees alone can amount to as much as 3 percent of gross revenues above the 5 percent franchise fee, and that does not include the costs that RCN has borne for in-kind contributions. Accordingly, imposition of the same "reasonableness" parameters to existing cable and OVS operators at the time that their current agreements are renewed is the minimum condition necessary to assure that the Commission's Order does not extend the disparity between new entrants and existing operators beyond the renewal dates. Absent such a condition, the Commission's *Order* will have eliminated what it

[12] Although the Commission's ***Order*** did not specifically mention OVS operators, such operators typically have agreements with LFAs that mirror, in many respects, the franchise agreements ***of*** incumbent cable operators and, importantly, are required by the Commission's Rules to match the PEG contributions of the incumbents. Accordingly, the same relief must, as a matter of competitive parity, apply to OVS operators – and indeed, there is a basis to conclude that since OVS operators are required to "match" the franchise fees and PEG obligations of other franchisees in the market, an OVS operator should be entitled to "match" the obligations of ***an*** entity who enters under the Commission's new rules at the time ***of*** such entry.

perceived to be entry barriers but created a governmentally-sanctioned competitive disparity without any end.

There is one timing issue, however, that the Commission perhaps did not consider when it reached its tentative conclusion that the findings of its ***Order*** should be applied to existing operators as they negotiate renewals of their agreements with LFAs, and that is the situation where there is already more than one existing cable or OVS operators in a market. In such markets, existing franchises and OVS agreements rarely expire at the same time. If the operator whose franchise or OVS agreement expires first is entitled to the relief mandated in the ***Order*** in its renewal, the other provider would be at a competitive disadvantage with that operator and, if there is a third entity in the market by that time, that operator as well. Ironically, since many of the exiting franchises of overbuilders like RCN expire after those of the incumbent cable operator given that they entered later, this could mean that a company like RCN will remain subject to additional fees and costs after both the incumbent cable operator and the incumbent telephone company – both with exponentially higher market capitalization than RCN – are granted the relief afforded by the ***Order.*** Accordingly, the Commission should assure that to the extent that either operator becomes eligible for the relief granted in the ***Order,*** the other should be entitled to a fresh look at its franchise so that such an anomalous and anticompetitive result cannot occur.[13]

As the Commission recognizes, the existence of a competitive operator has increased competition to the benefit of consumers, and those operators that are already competing should not be penalized for having previously entered the market. As noted by the Commission, the presence of a second cable operator results in the reduction of rates by approximately 15 percent,

[13] RCN sets forth the basis for the Commission to be able to require such a fresh look in Section II below.

or about $5 a month, for subscribers.[14] And to the extent the Commission's Order were to apply to all providers in a market, these reductions in many cases would be greater since the current fees and other costs paid pursuant to existing franchises must be recovered in the rates charged to subscribers.

B. Commission Authority Exists for Existing Franchisees Upon Renewal

In the ***Order,*** the Commission determined that it has authority to impose franchise reform for new entrants pursuant to Section 201(b), Section 303(r), and Section 4(i).[15] Section 201(b) authorizes the Commission to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act, including Title VI.[16] The Commission has broad rulemaking authority pursuant to Section 303(r) to implement rules and regulations "as may be necessary to carry out the provisions of this Act."[17] Further, the Commission may perform any and all acts "as may be necessary in the execution of its functions" pursuant to Section 4(i).[18] Thus, if the Commission has authority under these broad authorizations to implement rules under Section 621(a)(1) for new entrants, then the Commission clearly has authority to implement rules under Section 626 when operators seek renewal.

Moreover, similar to Section 621(a)(1), Section 626 allows operators to seek judicial review under Section 635 when a renewal proposal has been denied or has been adversely affected by a failure to act.[19] Specifically, the LFA has the ability to deny a franchise renewal if the cable operator has not "substantially complied with the material terms of the existing

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[14] ***Order*** **at ¶** *50.*

[15] ***Id.*** at ¶¶ 53-64.

[16] 47 U.S.C. § 201(b).

[17] 47 U.S.C. § 303(r).

[18] 47 U.S.C. § 154(i).

[19] 47 U.S.C. § 546(e).

franchise and with applicable law."[20] The regulation does not, however, provide for review when an LFA insists on terms that the Commission has now defined as unreasonable." A rule to ensure reasonable terms and conditions is therefore necessary to assure competition on a level playing field.

11. A FRESH LOOK AT EXISTING FRANCHISES AND OVS AGREEMENTS IS NECESSARY IF A NEW OPERATOR ENTERS UNDER THE NEW RULES

In addition to applying the franchise reforms to existing franchises at renewal, the Commission should apply the fresh look doctrine to existing franchises when a new provider enters a market to mitigate competitive harm. The fresh look requirement is a necessary modification to the Commission's tentative conclusion to apply the *Order* to agreements at renewal time. By applying the rule to all operators in a market, the Commission will promote consumer choice and full and fair competition without governmentally-imposed fees and costs on some operators but not others.

A fresh look requirement is consistent with prior Commission decisions.[22] When considering whether to require a fresh look at existing contracts, the Commission has considered: (1) whether one of the parties to the contracts has market power and has exercised that power to create long term contracts that create unreasonable barriers to competition; and **(2)** whether the contractual obligations can be nullified without harm to the public interest.[23]

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[20] ***Id.***

[21] ***Order*** at ¶ 57.

[22] ***See e.g., Expanded Interconnection With Local Telephone Company Facilities,*** Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7341 (1993) ***("Special Access Expanded Interconnection Order"); Competition in the Interstate Interexchange Marketplace,*** Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677 (1992)("***800 Portability Order").***

[23] ***Direct Access to the INTELSAT System,*** Report and Order, 14 FCC Rcd 15703, 1119 (1999). **See *also, Special Access Expanded Interconnection Order, 800 Portability Order.***

The Commission concluded in its ***Order*** that LFAs have created unreasonable barriers to competition by imposing requirements for payment of monetary and in-kind contributions above the capped 5 percent franchise fee.[24] These requirements have been incorporated into franchises which can extend out more than 10 years. Existing competitive operators should not be penalized for having entered the market without the benefit of the Commission's ***Order*** by being required to continue to provide such contributions when a "new entrant" incumbent telephone company does not have such costs included in its cost structure. Moreover, allowing what the Commission has determined to be unreasonable financial obligations of pre-existing franchises to continue into the future while new entrants are not subject to them will impair the ability of consumers to realize the full benefits of the Commission's ***Order.*** Absent a fresh look, an existing provider in the market will have an ongoing governmentally-imposed cost disadvantage that must necessarily be recovered in its rates while the entity that enters pursuant to the Commission's ***Order*** will not. This will of course mean that the "new entrant" will have less incentive to lower its rates as much as it would if its competitors in the market are not subject to such costs.

Specifically, therefore, the Commission should require a fresh look at existing franchises and OVS agreements when a new provider enters a market in accordance with the Commission's new franchise rules.[25] The LFA should provide notice to the existing franchisees when new provider files an application to provide service and allow the existing franchisees to terminate the existing franchise and negotiate a new franchise in accordance with the Commission's reforms.[26]

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[24] ***Order*** at ¶¶ 94-120.

[25] RCN is not proposing that a fresh look apply if no new competitive provider enters a market prior to an existing provider's franchise renewal.

[26] As discussed in Section I.A above, RCN urges the Commission to also apply a fresh look when the first existing franchised cable or OVS operator in a market has its franchise expire and becomes eligible for the relief granted in the ***Order*** through renewal.

The existing franchisee should be required to inform the LFA within some reasonable period of time that it wants to terminate its existing franchise and negotiate a new one. After informing the LFA, the same 90-day requirement established in the ***Order*** for new entrants should apply.[27]

In the instances where the Commission has applied the fresh look doctrine, the Commission determined that it needed to remove the roadblocks that may prevent carriers and their customers from reaping the benefits of changes in competition." The Commission has significantly changed the competitive landscape with the adoption of its ***Order*** and in order to ensure that all competitors and, more importantly, consumers, reap the benefits of the change, the Commission must adopt a fresh look when a new provider enters a market to take advantage of the franchise reforms. Absent a fresh look, the inequities of the reform application will adversely affect cable competition.

[27] We note that Section 626,47 U.S.C. § 546, currently provides for a 6-month period, which RCN submits is inconsistent with the Commission's ***Order*** since by definition, existing franchisees already have access to rights-of-way. See ***Order*** at ¶ 71.

[28] ***800 Portability Order*** at ¶ **13; *Special Access Expanded Interconnection Order*** at ¶¶ 23-25.

CONCLUSION

The Commission has applied franchising reforms to new entrants, and in order to create competitive parity, the Commission must similarly apply these reforms to existing cable operators, at a minimum, when the franchise is being renewed. In addition, the Commission should take a "fresh look" at existing franchises to promote consumer choice and full and fair competition and allow existing franchisees to implement the reforms when a new entrant enters the market and, in markets where there are already more than one franchised cable or OVS operator, when the first of such franchises expires and is up for renewal.

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